THE WISCONSIN CONSTITUTION AND SEPARATION OF POWERS DOCTRINE DO NOT AUTHORIZE THE EXECUTIVE BRANCH OF GOVERNMENT (I.E., STATE CORRECTIONS AGENTS) TO IMPOSE A CRIMINAL SENTENCE, INCLUDING THE CONDITIONS OF ONE

¶27 ES is a criminal "sentence" under Wis. Stat. § 973.01(2) ("A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113.").

¶28 Article VII, § 8 of the Wisconsin Constitution provides, "Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state..." Article V, § 4 of the Wisconsin Constitution (Executive Powers and Duties) makes no mention of criminal matters, especially not of criminal sentencing.

¶29 In other words, Article VII authorizes only the judicial branch of government to impose criminal sentences. The Supreme Court clarified this a century ago. "Indisputedly under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority." **Ex Parte United States**, 242 U.S. 27, 41-42 (1916). And "the imposition of a sentence, including any terms for probation or supervised release, is a core judicial function." **U.S. v. Kent**, 209 F.3d 1073, 1078 (CA7 2000) (emp. provided). But not just anyone serving in the judicial branch may impose criminal sentences. **U.S. v. Thompson**, 777 F.3d 368, 382 (CA7 2015) ("law clerks and judges' secretaries...are not allowed to decide the sentences of convicted defendants."). And while federal probation officers are employees of the federal judiciary, **id.**, Wisconsin's state probation agents are employees of its executive branch, 2015-2016 Wisconsin Blue Book 385. And as currently written, the Wisconsin Constitution doesn't authorize anyone from the executive branch to impose a criminal sentence, including conditions of one. And even though Wis. Stats. §§ 973.01(1) and 302.113(7) "authorize" the DOC to impose ES rules, the state

¶25 In a 4/22/15 letter, Judge Foster denied my motion (R279; attached Exh. A). In it, she noted my 5/28/15 family court hearing and stated, "In light of that upcoming family court matter that may directly affect the specific condition of extended supervision, I will delay scheduling your motion for hearing until your motion in family court is resolved...I will await further correspondence from you or from the Milwaukee County court before this matter is scheduled for hearing after May 28, 2015." (**Id.**).

RELEVANT LEGAL PRINCIPLES

¶26 Circuit courts have discretion to impose reasonable, appropriate, and legally correct extended supervision (ES) conditions. **State v. Hoppe**, 2014 WI App 51, ¶7 (cit. omit.). This discretion is properly exercised when the court provides a factual justification for the ES conditions. **State v. Gallion**, 2004 WI 42, ¶42. Courts impose ES conditions implicating the 1st Amendment under a higher standard than others. **Ysursa v. Pocatello Educ. Ass'n**, 555 U.S. 353, 358 (2009). In fact, courts impose 1st Amendment-affecting, content-based ES conditions through the "least restrictive means." **State v. Oatman**, 2015 WI App 76, ¶12. And "[t]he least-restrictive-means standard is exceptionally demanding." **Burwell v. Hobby Lobby Stores, Inc.**, 134 S. Ct. 2751, 2780 (2014). Courts also decline to impose overly broad ES conditions. **State v. Stewart**, 2006 WI App 67, ¶12. Courts embrace these standards because "[c]onditions of supervised release should facilitate an offender's transition back into ordinary life rather than stand as a significant barrier into a full reentry into society." **U.S. v. Neal**, 810 F.3d 512, 520 (CA7 2016). (I cite federal cases here because the reasoning in them are persuasive.) Courts assure defendants and reviewing courts they've exercised sentencing discretion judiciously by referencing "particular conduct, character, etc. of the defendant, rather than on the basis of loose generalizations." **U.S. v. Siegel**, 753 F.3d 705, 717 (CA7 2014).

ARGUMENT

legislature lacked authority to grant the DOC this power without having the Wisconsin Constitution amended, which it has not done.

¶30 "Under the doctrine of separation of powers, it is for the legislature to prescribe the penalty for a particular crime and the manner of its enforcement, and it is the duty of the court to impose that penalty." **State v. Dowdy**, 2012 WI 12, ¶27 (cit. omit.). "The sentencing court has discretion...to fashion a sentence based on the nature of the criminal offense, the need to protect the public and the need to rehabilitate the defendant." **State v. Horn**, 226 Wis. 2d 637, 646 (1999). "[O]nce a defendant has been...sentenced..., the litigation is over and the judicial process has ended." **Id.** at 650 (emp. added).

¶31 Here, the DOC has not only unlawfully imposed my sentence contrary to the Constitution and separation of powers doctrine, it's substantially interfered with the court's imposition of my sentence. For example, Judge Davis expressly noted that "[s]ubstance abuse apparently is not an issue, interestingly enough. That's kind of uncommon in our courts. So many offenders have substance abuse problems. He doesn't. In fact, I recall the testimony at trial that, if anything, he was trying to slow down his victim from drinking as much as she did. And every report is that he responsibly monitored his own consumption on these occasions" (4/25/08 Sent. Tr. 73; R255; emp. added). Clearly, Judge Davis denounced any alcohol problems on my part. Yet my previous agent, Jacob Leannais, imposed this condition on 10/22/13: "You shall not consume, purchase, possess, trade or sell any alcoholic substances including but not limited to beer, wine, malt liquor or hard liquor, nor shall you enter into any establishments whose primary function is the sale or consumption of alcohol without prior approval of the Agent (i.e., bars, taverns, liquor stores, etc.)." This condition plainly interferes with Judge Davis' sentence. So why did the Executive Branch's employee impose it? That Branch never justified it anywhere in my DOC record. And that's another reason the Executive Branch should not impose criminal sentences - it lacks clear standards such as a requirement to clearly justify the senten-

ces/conditions its employees impose. The Seventh Circuit calls - and rejects - this "standardless power" "which create opportunities for arbitrary action." **U.S. v. Scott**, 316 F.3d 733, 736 (CA7 2003). If sentencing courts must justify their sentences on the record, **Gallion**, supra at 42, why don't members of the Executive Branch? And even if the Executive Branch may "assist" the sentencing court with its sentencing, why did it impose a whopping 65 conditions on 11/1/13 compared to the court's approximately 7? The Executive Branch "imposed" my sentence relative ES and it lacked authority to do that. It was/is the court's duty to "impose" my sentence and the Executive Branch's duty to "administer" it. **Horn**, supra at 648. There's a difference. But that's not what happened in this case. Is that what's caused the "crimeless revocation" epidemic that's gotten the public in an uproar? (See, e.g., No new conviction, but sent back to prison: Re-incarceration for rule, parole violations costs taxpayers millions, Milwaukee Journal Sentinel, Jan. 17, 2015.)

¶32 And incredibly, DOC officials actually ask victims to impose sentencing conditions. "The agent's role in working with victims is...[t]o allow the victim an opportunity to provide input regarding conditions of supervision and